KOPERASI SERBAGUNA KEBANGSAAN BHD

v.

PEMUNGUT DUTI SETEM, WILAYAH PERSEKUTUAN, KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING SUMMONS NO: R1-24-33 OF 1998]
11 DECEMBER 2003

REVENUE LAW: *Stamp duty - Co-operative society - Purchase of property - Whether automatically exempted from paying duty - Whether must prove exemption - Application for refund - Time limit - Whether to be made within 12 months from date of execution - Stamp Act 1949 ss. 35 (First Schedule para. 5) 36, 57, 58*

In October 1995, the plaintiff, a co-operative society, had paid the defendant RM30,000 as stamp duty for the purchase of a property worth RM1.2 million. Some two years later, the plaintiff realized that it was exempted under para. 5 of the General Exemptions of the First Schedule to s. 35 of the Stamp Act 1949 ('the Act') from paying any stamp duty in respect of the purchase, and in the circumstances, sought a refund of the monies paid. The application however was rejected by the defendant on the ground that the monies were not refundable under s. 57 of the Act. The plaintiff contended that the defendant was wrong in rejecting the claim for refund, and hence applied for declarations that the levy was null and void and for restitution of the duty.

Held (dismissing the application):

[1] The defendant was wrong to rely on s. 57 for not refunding the duty. Section 57 referred to spoiled stamp, whereas the instrument in the present case was a transfer for which duty has been paid. Section 57 clearly did not apply to the plaintiff's application. (pp 225 f & 226 a)

[2] Paragraph 5 of the General Exemptions of the First Schedule to s. 35 of the Act, in any case, did not confer automatic exemption on all instruments executed by a co-operative society. It was the duty of the plaintiff, when submitting the appropriate form to the defendant for the adjudication of the proper stamp duty under the Act, to seek for exemption by showing that: (i) the instruments relate solely to the business of the society; (ii) the society was duly registered as a co-operative society; and (iii) the instruments were executed by the officer of the society. (p 226 e-g)

[3] The plaintiff had failed to bring to the attention of the defendant that it was in fact exempted by the said para. 5. Whilst it was true that the plaintiff's application was accompanied by a transfer form, the stamping proforma forms and the sale and purchase agreement, the plaintiff was duty bound still to apply for the exemption and to provide proof that it came within para. 5 of the General Exemptions. This the plaintiff failed to do and the defendant could not be faulted for imposing the stamp duty. (p 226 h)

[4] The plaintiff was also not entitled to the refund by virtue of the time limit set in s. 58 of the Act. The section had allowed repayment of stamp duty where a person had "inadvertently used a stamp for an instrument not liable to any duty" but made it clear that any application thereof ought to be made within 12 months after the date of the instrument. On the facts, the plaintiff had surpassed the time limit specified in s. 58. (p 227 a-d)

Legislation referred to:
Stamp Act 1949, ss. 35, 36, 57, 58

For the plaintiff - D Kalaimany; M/s. Kalai & Partners
For the defendant - Juliana Ismail; FC

Reported by WA Sharif

JUDGMENT

Raus Sharif J:

Application

This is an application by the plaintiff by way of originating summons for the following orders:

(a) a declaration that the levy of stamp duty in the sum of RM30,000 against the plaintiff *vide* defendant's letter dated 8 September 1995 is *ultra vires* s. 35 First Schedule, 5 Stamp Act 1949 and is null and void and of no effect;

(b) an order directing the defendant to restitute to the plaintiff a sum of RM30,000;

(c) an order directing the defendant to pay the plaintiff interest at the rate of 8% per annum on the sum of RM30,000 from 9 September 1997 to the date of full realization; and

(d) costs.

Facts

The brief facts leading to this application are as follows:

The plaintiff is a co-operative society incorporated under the Co-operative Society Act 1993. By a sale and purchase agreement dated 24 May 1995 the plaintiff purchased a property therein described for a total purchase price of RM1.2 million. The plaintiff's solicitors submitted the appropriate forms to the defendant for the adjudication as to the proper stamp duty under s. 35 of Stamp Act 1949 ('the Act'). The defendant, acting under s. 36 of the Act, assessed the stamp duty payable on transfer of the property to be a sum of RM30,000. The plaintiff, on 10 October 1995, paid the said sum of RM30,000.

On 6 August 1997, approximately two years later, the plaintiffs discovered that under s. 35 (General Exemptions) First Schedule, para. 5 of the Act, the plaintiff being a co-operative is exempted from paying any stamp duty and sought for a refund of the same. By a letter dated on 9 October 1997 the defendant rejected the claim on the ground that:

> Suratcara tuan disempurnakan pada 1995. Sebaliknya permohonan tuan dibuat pada 6hb Ogos, 1997.
>
> Seksyen 57 tersebut di atas diperuntukkan:
>
> ... the application for relief is made within twelve months after the stamp has been spoiled or become useless in the case of an executed instrument after the date of the instrument ... .

Findings

I have no hesitation to find that the defendant was wrong to rely on s. 57 for not refunding the duty to the plaintiff. To me, s. 57 refers to spoiled stamp. The heading reads "Allowance for spoiled stamps". Section 57(1) refers to stamp on any paper. So is sub-s. 57(b). Section 57(c) refers to bills of exchange while s. 57(d) refers to promissory note and s. 57(f) refers to:

(i) instrument which is found to be void from the beginning;

(ii) instrument subsequently found unfit by reason of error or mistake;

(iii) instrument which is incomplete or not registered within time which fails for the purpose or become void;

(iv) instrument which is inadvertently and unsigned spoiled and *in lieu* whereof another instrument made and for the same purpose is executed and duly stamped or which become useless because transaction affected by some other instrument duly stamped.

The proviso to sub-s. 57 allows for relief if application for the same is made within 12 months after the stamp becomes spoilt, useless or if in case of an executed instrument after the date of the instrument. However, the instrument in our present case, is a transfer from which duty has been paid. Clearly s. 57 of the Act does not apply to the plaintiff's application.

Thus, the next issue is whether or not the plaintiff is entitled for the refund of the paid stamp duty. The plaintiff is relying on the ground that the plaintiff is exempted from any stamp duty on the transfer of the said property in virtue of s. 35 of the Act which reads as follows:

> 35. Exemptions.
>
> The instruments appearing under the heading of "General Exemptions" in the First Schedule shall not be chargeable with duty.

Paragraph 5 of the General Exemptions of the First Schedule provides *inter alia:*

> 5. All instruments relating solely to the business of any society registered under any written law relating to co-operative societies and executed by an officer or member of such society, the duty on which, but for the exemption hereby granted, be payable by such officer or member.

To me, the above provision does not confer automatic exemption on all instruments executed by a cooperative society. It is the duty of the plaintiff when submitting the appropriate form to the defendant for the adjudication of the proper stamp duty under the Act, to seek for exemption by showing:

(a) the instruments relating solely to the business of any society;

(b) the society registered under any written law relating to cooperative societies; and

(c) the instruments executed by the officer or member of such society.

It is clear in this case that the plaintiff failed to bring to the attention of the defendant that it was in fact exempted by para. 5 of the General Exemption of the First Schedule. No doubt that the plaintiff's application was accompanied by one copy of the transfer Form 14A, 5 sets of the stamping performa forms and the sale and purchase agreement, but I am of the view that, it is still the duty of the plaintiff to apply for the exemption and to provide proof that it comes within para. 5 of the General Exemption of the First Schedule. The plaintiff had failed to do so and the defendant cannot be faulted for imposing the stamp duty.

Furthermore, I am of the view that the plaintiff is not entitled for the refund because of the provisions on time limit for a repayment of the stamp duty as specified by s. 58 of the Act. Section 58 provides as follows:

> 58. Allowance for misused stamps.
>
> When any person has inadvertently used for an instrument liable to duty a stamp of greater value than was necessary, or has inadvertently used a stamp for an instrument not liable to any duty, the Collector may, on application made within twelve months after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed, and upon the instrument, if liable to duty, being stamped with the proper duty cancel and allow as spoiled the stamp so misused.

The said provision does allow an application for repayment of stamp duty where a person has "… inadvertently used a stamp for an instrument not liable to any duty…". But it must be made within 12 months after the date of the instrument. In our present case, the plaintiff paid the stamp duty of RM30,000 on 10 October, 1995 and the application for repayment was made on 6 August, 1997. Clearly, it surpassed the time limit as specified by s. 58 of the Act.

For the above said reason, the plaintiff's application is dismissed with costs.